

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**I.A. No. 40/2017
in
Petition No. 8/MP/2014**

**Coram:
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K.Iyer, Member**

Date of Order: 8th of January, 2018

In the matter of

Interlocutory Applications for directions to calculate excise duty on coal.

**And
In the matter of**

GMR Warora Energy Limited
701/704, 71h Floor, Naman Centre, A Wing
SKC (Sandra Kurla Complex),
Sandra, Mumbai 400051

..... **Applicant**

Versus

1. Maharashtra State Electricity Distribution Company Limited
Fifth Floor, Prakashgadh, Plot No. G-9,
Anant Kanekar Marg, Sandra (East),
Mumbai-400051

2. Electricity Department, Dadra and Nagar Haveli
Vidhyut Bhavan, opp. Secretariat,
Dadra and Nagar Haveli, Silvassa, 396230

.....**Respondents**

The following were present:

Shri Amit Kapoor, Advocate, GMRWEL
Shri Vishrov Mukherjee, Advocate, GMRWEL

ORDER

The Applicant, GMR Warora Energy Limited (GMRWEL) has filed this Interlocutory Application pursuant to the liberty granted in the order dated 1.2.2017 in Petition No. 8/MP/2014 and has sought approval of the Commission to include Basic

Price, Sizing Charges, Royalty, Stowing Excise Duty, National Mineral Exploration Trust, District Mineral Foundation, Stowing Excise Duty, Surface Transportation Charges, Chhattisgarh Paryavaran Upkar, Chhattisgarh Vikas Upkar, NiryatKar, Assessable Value of Central Excise Duty and Central Excise Duty for the purpose of arriving at assessable value in calculating excise duty on coal.

2. The brief background of the case is that the Applicant, GMR Warora Energy Limited, filed Petition No. 8/MP/2014 for seeking compensation of the cost incurred by it due to change in law events. The Commission after considering the submissions of the parties, vide order dated 1.2.2017 in Petition No. 8/MP/2014 directed the Applicant to approach the appropriate authority in the Central Excise Department to seek a clarification regarding inclusion of Royalty and Stowing Excise Duty and other charges for determining assessable value of coal and approach the Commission for appropriate directions. Relevant portion of the said order is extracted as under:

“70. The levy of excise duty on coal through the Finance Act, 2012 was introduced which was after the cut-off date and has impact on the cost of generation of power for supply to MSEDCL. The Petitioner cannot be expected to factor in the bid the Excise Duty on coal which was not in existence as on cut-off date. Therefore, levy of excise duty on coal are covered under change in law. Accordingly, the Petitioner is entitled to be compensated through adjustment in tariff on account of excise duty on coal in case of MSEDCL PPA. In case of DNH PPA, the cut-off date was 1.6.2012 and accordingly, the change in the rate of excise duty after the said date (i.e. Notification dated 5.3.2013) will be admissible in case of DNH PPA. The excise duty shall be reimbursable on the base price of coal. As regards the inclusion of royalty and stowing excise duty and other charges for determining excisable value of coal, the Petitioner is directed to approach the Appropriate Authority in the Central Excise Department for clarification and if it is confirmed that royalty and stowing excise duty are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the Petitioner may approach the Commission for appropriate directions.”

3. The Applicant has submitted that pursuant to the Commission`s direction dated 1.2.2017, it approached the Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh for seeking clarification regarding components to be included in the assessable value of coal for computation of Excise Duty. In response, the Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh vide its letter dated 23.3.2017 clarified that value of coal, Royalty, Stowing Excise Duty, National Mineral Exploration Trust, District Mineral Foundation, Sizing Charge and Surface Transportation Charge, Niryat Kar, CG Development Tax and CG Environment Tax shall be added for arriving at the assessable value of coal for payment of Excise Duty. Based on the clarification of Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh, the Applicant has prayed that value of coal, Royalty, Stowing Excise Duty, National Mineral Exploration Trust, District Mineral Foundation, Sizing Charges, Surface Transportation Charge, Niryat Kar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax be considered for the purpose of arriving at excisable value for calculating excise duty on coal. The Applicant has submitted that failure to include the amounts pertaining to the above components in assessable value of coal would lead to imposition of interest and penalty as per the Central Excise Duty Act, 1944.

4. Notices were issued to the respondents to file their replies. No reply has been filed by the respondents.

Analysis and Decision:

5. We have considered the submissions of the Applicant and perused the documents on record. Pursuant to the Commission`s direction, the Applicant

approached the Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh seeking clarification with regard to the components to be included in the assessable value of coal for computation of Excise Duty. The Superintendent (Tech.), Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh vide its letter dated 23.3.2017 has given the following clarification:

“Please refer to your letter No. Nil dated 20.3.2017 seeking clarification therein whether royalty and Stowing Excise Duty elements are to be added or not in the assessable value of coal.

In this connection, it is to inform you that as per Section 4 of Central Excise Act, 1944, following elements shall be added for arriving the assessable of coal for payment of Excise Duty:

- (i) Value of Coal
- (ii) Royalty
- (iii) Stowing Excise Duty
- (iv) National Mineral Exploration Trust (NMET)
- (v) District Mineral foundation (DMT)
- (vi) Sizing charge
- (vii) Surface transportation charge
- (viii) Niryat Kar
- (ix) CG Development tax
- (x) CG Environment tax

Further, it is to inform you that M/s South Eastern Coalfields Limited, Bilaspur had obtained Centralized Registration No.AADCS206EEM032 a under Rule 9 of Central Excise Rules, 2002 for production and clearance goods ‘Coal’ falling under Chapter Heading No. 27011920 of Central Excise Tariff Act, 1985 and as per Section 4 of Central Excise Act, 1944 is paying Central Excise Duty and Clean Energy Cess under Clean Energy Cess Rules, 2010.”

6. The Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh has relied on Section 4 of the Central Excise Act, 1944 in support of the decision for inclusion of the above cited elements in the assessable value of coal. Section 4 of the Central Excise Act, 1994 provides as under:

“Section 4. Valuation of excisable goods for purposes of charging of duty of excise.

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation. - For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,-

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) persons shall be deemed to be "related" if -

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.”

7. As per the above provisions of the Central Excise Act, 1944, the price-cum-duty of excisable goods sold by an assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods. Such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

8. All components indicated by SECL for computation of assessable value of coal such as the value of coal, Stowing Excise Duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing Charges, Surface Transportation Charge, Niryat Kar, Chhattisgarh Development Tax and Chhattisgarh Environment Tax (except royalty) are in the nature of “Price-cum- duty” and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the expenditure of Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty. It is clarified that allowing these charges for inclusion in the assessable value for computation of Excise Duty shall not be construed that these charges are allowed under Change in Law. As regard Royalty, it is noted that the issue whether royalty determined under Section 9/15(3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon’ble Supreme court on a reference by Five Judges Bench of the Hon’ble Supreme Court in Mineral Area Development Authority and Others Vs. Steel Authority of India and Others (2011 SCC 450). The specific reference is as under:

“(a) Whether “royalty determined under Sections 9/15 (3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?”

Therefore, Royalty shall be included in the assessable value of coal subject to the decision of the Hon`ble Supreme Court.

9. Accordingly, we allow all the charges given in the letter dated 23.3.2017 of the Superintendent (Tech.), Office of the Assistant Commissioner, Custom and Central Excise Bilaspur, Chhattisgarh for the purpose of inclusion in the assessable value of coal for computation of Excise Duty, subject to the condition with regard to Royalty. It is clarified that the Petitioner shall be entitled to recover the Excise Duty in proportion to the actual coal consumed corresponding to the scheduled generation or actual generation, whichever is less, for supply of electricity to MSEDCL and Electricity Department, Dadra and Nagar Haveli.

10. I.A. No. 40/2017 in Petition No. 8/MP/2014 is disposed of in terms of the above.

Sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member